

Hackert v Emmanuel Cong. United Church of Christ
2014 NY Slip Op 33697(U)
March 31, 2014
Supreme Court, Saratoga County
Docket Number: 20093430
Judge: Stephen A. Ferradino
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APR 04 2014

SUPREME COURT
STATE OF NEW YORK

COUNTY OF SARATOGA

CARL HACKERT and CATHERINE HACKERT,

Plaintiffs,

- against -

EMMANUEL CONGREGATIONAL UNITED
CHURCH OF CHRIST and RIVERCREST
ENTERPRISES, INC.,

Defendants.

**AMENDED
DECISION and ORDER**
RJI # 45-1-2011-0754
Index # 20093430

2014 APR 24 AM 9:23
SARATOGA COUNTY
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FILED

RIVERCREST ENTERPRISES, INC.,

Third-Party Plaintiff,

- against -

CLYDE WILSON, INDIVIDUALLY AND D/B/A
WILSONS CONSTRUCTION and
WILSONS CONSTRUCTION, INC.,

Third-Party Defendants.

CLYDE WILSON, INDIVIDUALLY AND D/B/A
WILSONS CONSTRUCTION,

Fourth-Party Plaintiff,

- against -

ERIE INSURANCE COMPANY and
ERIE INSURANCE COMPANY OF NEW YORK,

Fourth-Party Defendants.

APPEARANCES:

Burke, Scolamiero, Mortati & Hurd, LLP
Attorneys for the Third-Party Plaintiff
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[* 2]

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STEPHEN A. FERRADINO, J.

The third-party defendant/fourth-party plaintiff, Clyde Wilson, individually and d/b/a Wilsons Construction (Wilson) have moved for an order of this court, pursuant to Civil Practice Law and Rules (CPLR) §3212, granting summary judgment in his favor and dismissing the third-party action in its entirety. Wilson has requested a judgment of this court declaring that he was an employee of the third-party plaintiff, Rivercrest Enterprises, Inc. (Rivercrest) and that, as such, he was an insured under a policy of general liability insurance that was issued to Rivercrest by the fourth-party defendants, Erie Insurance Company and Erie Insurance Company of New York (Erie Insurance). Rivercrest and Erie Insurance have opposed the motion.

Erie Insurance has moved this court for an order, pursuant to CPLR §3212, granting summary judgment in its favor and dismissing the fourth-party complaint, with prejudice. Erie Insurance also requests a judgment of this court declaring that they are not obligated to defend or indemnify Wilson in connection with the underlying primary action because Wilson was an independent contractor, and not an insured under the policy of general liability insurance issued by it to Rivercrest. Wilson has opposed the motion.

Rivercrest has filed a cross-motion requesting an order of this court, pursuant to CPLR

§3212, granting summary judgment in its favor and dismissing all claims and counterclaims asserted against it by Wilson. Rivercrest seeks a judgment of this court declaring that, at all times relevant to this litigation, Wilson was an independent contractor. Rivercrest also requests an order of this court awarding it indemnification from Wilson.

Wilson has filed a cross-motion requesting an order of this court, pursuant to CPLR §3212, granting summary judgment in its favor and dismissing the third-party action on the basis that Rivercrest is not entitled to contribution and/or indemnification. Wilson has also moved this court for an order permitting him to amend his answer to the third-party complaint. Rivercrest and Erie have opposed the cross-motion.

The plaintiffs commenced the underlying action seeking damages for personal injuries sustained as a result of a fall through a floor opening. The underlying personal injury action settled. Rivercrest was one of the defendants in the underlying personal injury action. The settlement amount was paid by Rivercrest's insurance company, Erie Insurance.

Rivercrest commenced a third-party action against Wilson. Rivercrest maintained that Wilson was an independent contractor and that it was his negligence that caused, or contributed to, the plaintiff's injuries. Rivercrest sought contribution and indemnification from Wilson. Thereafter, Wilson commenced a fourth-party action against Erie Insurance seeking defense and indemnification. In so doing, Wilson argued that he was an employee of Rivercrest and, as such, an insured under a policy of general liability insurance that was issued by Erie Insurance to Rivercrest.

Wilson, Rivercrest and Erie Insurance have each moved for summary judgment. In order to succeed in obtaining summary judgment, the moving party must establish their cause of action or defense sufficiently to warrant the court, as a matter of law, in directing

judgment in their favor. CPLR §3212(b). To prevail on the motion, the moving party must offer evidentiary proof in admissible form. *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]. The party opposing the motion must demonstrate upon admissible evidence the existence of a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. The evidence presented must be viewed in the light most favorable to the nonmoving party. See, *Sutherland v Thering Sales & Serv., Inc.*, 38 AD3d 967, 968 [3d Dept 2007]; *De Cicco v Longendyke*, 37 AD3d 934, 936 [3d Dept 2007]. Summary judgment should be granted only in the absence of any material or triable issue of fact. *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]. The Court should not employ this drastic remedy and deny a party their day in court if there is any doubt as to whether such issue exists or if the issue is arguable. *Id.*, citing *Barrett v Jacobs*, 255 NY 520, 522 [1931].

Rivercrest has requested an order of this court awarding it indemnification from Wilson. Wilson has requested an order of this court dismissing the third-party action on the basis that Rivercrest is not entitled to contribution and/or common-law indemnification.

The court agrees with Wilson's contention that the record evidences Rivercrest's intent to withdraw its claim for contribution. Wilson argues that Rivercrest's common-law indemnification claim must be dismissed because the plaintiff's fall and resulting injuries resulted from the negligence of Rivercrest's employees, who violated Wilson's directive regarding safety on the project. Specifically, Wilson argues that it was a Rivercrest employee, or another subcontractor, who failed to replace the plywood on the platform after Rivercrest's work was completed on the day in question. This negligence, Wilson argues, cannot be attributed to him and cannot be the basis for common-law indemnification.

Rivercrest argues that it is entitled to common-law indemnification from Wilson. Rivercrest submits that Wilson supervised the construction workers and told them what work to do and how to do it. Wilson was responsible for safety on the job site. According to Rivercrest, the record establishes that Wilson directed that the plywood not be securely fastened on the platform. Wilson directed that the platform not be fastened in place so that building materials could be passed through the opening in the platform.

A review of the record reveals that questions of fact exist as to whether or not Rivercrest is entitled to common-law indemnification from Wilson. It will be for the jury to determine whether Wilson was actively at fault in bringing about the plaintiff's injury or whether Wilson exercised actual supervision and control over the injury-producing work. See, *McCarthy v Turner Const., Inc.*, 17 NY3d 369 [2011].

The underlying issue presented in the remainder of the motions for summary judgment is whether Wilson was an employee of Rivercrest or an independent contractor. The determination as to whether an individual is an employee, or an independent contractor turns principally on the question of who exercises control over the method and means of the work. *Harjes v Parisio*, 1 AD3d 680, 680-681 [3d Dept 2003]; *Greene v Osterhoudt*, 251 AD2d 786, 787 [3d Dept 1998]. Whether an individual is an independent contractor or an employee must be determined on a case by case basis and typically involves a question of fact as to who controls the methods and means by which the work is to be done. *Stevens v Spec, Inc.*, 224 AD2d 811, 811-812 [3d Dept 1996].

“Whether an employment relationship exists necessarily is a question of fact, involving a determination of ‘the existence of a right of control over the agent in respect of the manner in which his work is to be done.’” *Matter of Villa Maria Inst. of Music (Ross)*, 54 NY2d 691,

692 [1981], quoting *Matter of Morton*, 284 NY 167, 172 [1940]. “All aspects of the arrangement must be examined to determine whether the degree of control and direction reserved to the employer establishes an employment relationship.” *Matter of Villa Maria Inst. Of Music (Ross)*, 54 NY2d at 692. Other important factors that should be considered include: whether the employer furnishes the tools or equipment, whether payments are made in lump sums and whether social security withholdings and taxes are withheld from such payments. *Stevens v Spec, Inc.*, 224 AD2d at 812; *Harjes v Parisio*, 1 AD3d at 681; *Greene v Osterhoudt*, 251 AD2d at 787.

As noted previously, the Court should not grant summary judgment, and deny a party their day in court, if there is any doubt as to whether a material or triable issue of fact exists or, if the issue is arguable. *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d at 441, citing *Barrett v Jacobs*, 255 NY at 522. In this case, the record reveals that the issue of whether Wilson was an employee of Rivercrest, or an independent contractor, is certainly arguable.

Wilson contends that he was an employee of Rivercrest. In support of this argument, Wilson submitted the deposition testimony of Rivercrest’s president, Vance Fleury (Fleury). Fleury testified that Wilson was Rivercrest’s only general foreman and superintendent. According to Fleury, Wilson worked for Rivercrest, continuously, since the mid 1990s, on multiple projects. Fleury testified that Wilson was one of Rivercrest’s employees on the church construction project.

According to Wilson, Fleury was his boss and approved all of the work that was done. Wilson testified that all of the work performed at the church construction project was done pursuant to a contract that Rivercrest had with the church. All of the work was performed by Rivercrest employees. Wilson did not have his own employees. Wilson testified that he

supervised the Rivercrest employees and held weekly safety meetings. Wilson described himself as a working supervisor.

Wilson testified that he submitted weekly time cards and was paid accordingly. He also submitted invoices for labor. In his sworn affidavit, Wilson averred that he was Rivercrest's general foreman. He was not hired for a specific job. Wilson had full access to Rivercrest's equipment. According to Wilson, he was issued a company cellular telephone and was given a one week, paid vacation by Rivercrest.

Rivercrest and Erie Insurance argue that Wilson was an independent contractor. In support of this contention, the parties note that in his answer to the third-party complaint, Wilson admitted that he, "is and was an Independent Contractor." In addition, Wilson admitted that he, "is and was doing business as Wilsons Construction." At his deposition, Wilson testified that Clyde Wilson d/b/a Wilsons Construction is a functioning business. Rivercrest and Erie Insurance further note that Wilson acknowledged that he was free to accept other jobs, but did not do so because Rivercrest kept him busy.

Rivercrest and Erie Insurance assert that Rivercrest issued checks to Wilsons Construction, not to Clyde Wilson individually. Rivercrest did not deduct taxes from these checks. Rivercrest issued IRS form 1099s, reflecting nonemployee compensation paid to Wilsons Construction. Wilson's tax records reveal that from the wages attributable to Wilsons Construction, certain deductions for business expenses were taken.

Rivercrest and Erie Insurance submit that, at the time of the underlying accident, Wilson maintained his own commercial general liability insurance policy. That policy was issued by Dryden Mutual Insurance Company. In regard to this policy, Wilson maintained that his status as an employee of Rivercrest was further evidenced by the fact that Rivercrest

reimbursed him for the cost of that insurance policy.

Whether or not Wilson was an employee of Rivercrest, or an independent contractor, is a question of fact for the jury to decide. This determination cannot be made as a matter of law where, as is the case here, the evidence in the record is disputed and the facts presented are not compellingly clear. *Harjes v Parisio*, 1 AD3d at 681; *Greene v Osterhoudt*, 251 AD2d at 787. The motions for summary judgment are denied.

Wilson has moved this court for an order permitting him to amend his answer to the third-party complaint to reflect that he denies the allegations set forth in paragraphs 2 and 4 of the third-party complaint, relating to his status as an independent contractor. According to counsel for Wilson, although the original answer reflected that Wilson admitted the allegations set forth in these paragraphs, this was scrivener's error or law office failure. The error was not discovered until pointed out by Rivercrest in their cross-motion.

It is well settled that leave to amend a pleading pursuant to CPLR §3025(b) should be freely given provided that there is no prejudice and the proposed amendment is not plainly lacking in merit. *Nelson v State of New York*, 67 AD3d 1142, 1143 [3d Dept 2009]; *Ciarelli v Lynch*, 46 AD3d 1039, 1039-1040 [3d Dept 2007]; *Bast Hatfield, Inc. v Schalmont Cent. School Dist.*, 37 AD3d 987, 988 [3d Dept 2007]. In the absence of an abuse of discretion, a court's decision as to whether to grant leave to amend a pleading shall remain undisturbed. *Pagan v Quinn*, 51 AD3d 1299, 1300 [3d Dept 2008]; *Nelson v State of New York*, 67 AD3d at 1143; *Ciarelli v Lynch*, 46 AD3d at 1040.

In order to demonstrate prejudice, it must be established that a party "has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position." *State of New York v Exxon Corp.*, 7 AD3d 26,

929 [3d Dept 2004], quoting *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]. Here, the record is clear that no such prejudice exists. All parties are, and have been, fully aware of Wilson's position that he was an employee of Rivercrest. Neither Rivercrest nor Erie Insurance will be hindered in the preparation of their case or prevented from taking any measure in support of their positions. Therefore, Wilson's motion to amend his answer is granted.

The motions for summary judgment are each denied. Wilson's motion for leave to amend his answer to the third-party complaint is granted. Any relief not specifically granted herein is denied. This decision shall constitute the order of the Court. No costs are awarded to any party. The original decision and order shall be forwarded to the attorney for the third-party defendant/fourth-party plaintiff for filing and entry. The underlying papers will be filed by the court.

Dated: March 31, 2014
Malta, New York

Stephen A. Ferradino
STEPHEN A. FERRADINO, J.S.C.
ENTERED

Craig A. Hayner

Craig A. Hayner

Saratoga County Clerk

2014 APR 24 AM 8:23
SARATOGA COUNTY
CLERK'S OFFICE
BALTIMORE

ENTERED

Papers Received and Considered:

Notice of Motion, dated November 4, 2013

Affirmation, of Edward B. Flink, Esq., affirmed November 4, 2013, with Attached Exhibits 1-17

Affidavit of Clyde Wilson, sworn to October 21, 2013

Memorandum of Law in Support of Third-Party Defendant/Fourth-Party Plaintiff Clyde Wilson's Motion for Summary Judgment, dated November 4, 2013

Erie Insurance Company and Erie Insurance Company of New York's Notice of Motion for Summary Judgment, dated November 27, 2013

Affirmation of Jessica L. Foscolo in Support of Erie Insurance Company's and Erie Insurance Company of New York's Motion for Summary Judgment, affirmed November 27, 2013, with Attached Exhibits A-N

Affidavit of Denise Schad in Support of Erie Insurance Company's and Erie Insurance Company of New York's Motion for Summary Judgment, sworn to November 26, 2013, with Attached Exhibits A-G

Memorandum of Law in Support of Erie Insurance Company's and Erie Insurance Company of New York's Motion for Summary Judgment, dated November 27, 2013

Notice of Cross-Motion, dated December 6, 2013

Attorney Affidavit, of Mark G. Mitchell, Esq., sworn to December 6, 2013, with Attached Exhibits A-M

Memorandum of Law, dated December 6, 2013

Notice of Cross-Cross-Motion, dated January 24, 2014

Affirmation, of Edward B. Flink, Esq., affirmed January 24, 2014, with Attached Exhibits A-B

Memorandum of Law in Support of Third-Party Defendant/Fourth-Party Plaintiff Clyde Wilson's Motion for Summary Judgment, dated January 24, 2014

Erie Insurance Company and Erie Insurance Company of New York's Memorandum of Law in Opposition to Clyde Wilson, Individually and d/b/a Wilsons Construction and Wilsons Construction, Inc.'s Motion for Summary Judgment, dated January 24, 2014, with Attachment

Answering Affirmation, of Edward B. Flink, Esq., affirmed January 24, 2014, with Attached Exhibits A-B

Memorandum of Law in Opposition to Fourth-Party Defendants' Motion for Summary Judgment, dated January 24, 2014

Reply Affirmation, of Edward B. Flink, Esq., affirmed January 31, 2014

Attorney Affirmation, of Mark G. Mitchell, Esq., affirmed February 3, 2014

Reply Affirmation of Jessica L. Foscolo in Further Support of Erie Insurance Company's and Erie Insurance Company of New York's Motion for Summary Judgment and in Opposition to Clyde Wilson, Individually and D/B/A Wilsons Construction and Wilsons Construction, Inc.'s Cross-Cross-Motion to Serve an Amended Answer and Summary Judgment Against Rivercrest

Enterprises, Inc., affirmed February 3, 2014, with Attached Exhibits A-B

Reply Affirmation, of Edward B. Flink, Esq., affirmed February 6, 2014

Fax Letter, dated February 12, 2014, to the Hon. Stephen A. Ferradino, J.S.C. from Jessica L. Foscolo, Esq.

Letter, dated February 12, 2014, to the Hon. Stephen A. Ferradino, from Paul J. Campito, Esq.